IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 144.

B. F. THOMPSON, APPELLANT,

vs.

D. M. FERRY ET AL., APPELLEES.

BRIEF OF APPELLANT.

STATEMENT OF CASE.

The subject-matter of this litigation is one-half undivided interest in the Poland and Hamilton mines and mining claims in Yavapai county, Arizona.

Both parties deraign title from the same common source, M. E. Collins, as the basis and origin upon which this dispute (limitation, which was sustained by the court, and on which only appellees prevailed) arose.

True, both sides introduced the same evidence, beginning with the location notices of the respective mines, to wit, the Poland and Hamilton, and ending with the United States patents to Dickey and various transfers down to appellees.

But as to the title in this particular dispute, it begins in Marcellus E. Collins. Both parties to this litigation derived title from the same common source. So that the only necessary tracing of the title of the respective sides begins with Collins, and it therefore becomes unnecessary to go further back than the title which began in him.

PLEADINGS.

The plaintiff in his declaration or complaint brought his action to quiet title in himself to an undivided one-half interest in the Poland and Hamilton mining claims. He declared title in himself, alleging the history of the title from the location down to the transfer of the one-half interest sued for, as it was transferred to him by Collins and Scofield, and demanded a decree of the court that he be declared the absolute owner of an undivided one-half interest in the said Poland and Hamilton mining claims, and entitled to the undisputed possession of the same; that the defendants, appellees here, be declared to be trustees for him as holding the said one-half interest in trust for him, and that they be required to convey that interest to him; that they be enjoined, &c., from asserting any right or title thereto. (See plaintiff's amended complaint, page 17, folio 34, to page 23, folio 46, printed Record.)

In this it will be seen that he deraigns title from M. E. Collins.

The defendants below, appellees here, in their answer plead an estoppel of record, alleging the action of Roberts against M. E. Collins to foreclose a mortgage given by Collins to Roberts on October 25, 1883, setting up that all of the inter-

est of Collins was adjudged to be subject to the lien, and that the interests of Collins and Scofield were sold, &c.

They further allege that if plaintiff ever had any interest in said mining claims that the same was destroyed by reason of the fact that E. M. Dickey, one of defendant's grantors, had obtained patent from the United States Government in his own name and on his application, and no adverse proceeding had been taken by either Scofield or Thompson during the pendency of the application. In other words, no "adverse" was filed when his application was pending.

They also set up innocent purchase, and finally plead adverse and hostile holding and limitation of the statute, which made the issues between the respective parties, plaintiff and defendant. (See defendant's amended answer, pages 3 to 5, folios 11 to 23, printed Record.)

NOTE.—There are other pleadings of the parties shown in the record, but the issues were finally narrowed down to this amended complaint and amended answer, and upon these and the issues joined by them the case was tried.

RECORD EVIDENCE.

Plaintiff introduced location notices and other muniments of title really not material, but we begin with the material evidence, the deed of Edward W. Russell, of Chicago, to Marcellus E. Collins, to one-half undivided interest in the Poland and Hamilton mining claims, dated October 25, 1882 (folios 156, 157, inclusive, printed Record). This is the first one-half interest ever obtained in the claims by Collins.

Second. Mortgage of M. E. Collins of this same one-half interest to John M. Roberts, dated October 25, 1883, exe-

cuted one year after Collins acquired this title (folios 159–163, inclusive, printed Record).

We note that this mortgage to Roberts, October 25, 1883, of one-half interest in the Poland and Hamilton mining claims, was all the interest he then owned, and the record showed it, as was stated at the trial, and this is the beginning of the title of defendants below, by authority of which they claim the whole property.

Third. Twenty days thereafter M. E. Collins bought from one Charles C. Lane one-fourth interest in the Poland and Hamilton mining claims, deed dated November 14, 1883. (See folios 163–166, inclusive, printed Record.) On the same day M. E. Collins sold the same one-fourth interest to Robert Scofield. (See Collins' deed to Scofield, folio 166, at page 85, folio 168, page 86, printed Record.) This was an interest not incumbered by the mortgage, of course. Two days later, on November 16, 1883, Collins bought another one-fourth interest in the Poland and Hamilton mining claims from John Howell. (See Howell's deed to Collins, page 87, folio 169, printed Record.) These two undivided one-fourth interests thus obtained by Collins from Lane and Howell after the execution of the mortgage to Roberts of the first one-half interest acquired comprise the interest in the Poland and Hamilton mining claims here sued for, which were never covered by the mortgage, never intended to be, and, so far as the record is concerned, known not to be.

Fourth. Plaintiff next introduced deed of M. E. Collins to B. F. Thompson, the present appellant and plaintiff in the

case below, showing the transfer by deed from Collins to Thompson of an undivided one-fourth interest to the Poland and Hamilton mining claims, dated August 18, 1884. (See Collins' deed to Thompson, folios 172–174, inclusive, pages 88, 89, printed Record.)

Fifth. Plaintiff next introduced deed of Scofield to Thompson, the plaintiff in this case, of date July 23, 1896, recorded in Book 35, at page 590, records of Yavapai county, Arizona, conveying an undivided one-fourth interest to the Poland and Hamilton mining claims.

Now, this deed of Collins to Thompson of August 18, 1884, and that of Scofield just mentioned, completed the title to the one-half interest of Thompson in the mining claims sued for, and comprise his interest, the subject-matter of this suit. (That this deed was made part of the record, see folio 71, page 36, printed Record.)

This completed plaintiff's evidence of title.

Defendants below, appellees here, began by introducing the complaint and judgment-roll, showing the foreclosure of the mortgage from Collins to Roberts of the one-half interest he first acquired from Russell in 1882 (pages 90–97, inclusive, folios 175–191, inclusive, printed Record).

It will be noticed at this point that the mortgage exhibited and executed by Collins was somewhat ambiguous in description. It purported to be a mortgage of all of the right, title, and interest that the said party of the first part (Collins) had in and to the Poland and Hamilton mining claims. "All of his right, title, and interest" was what was mortgaged, the particular amount or extent of which was not named, but the records of titles at that time, of which the world had to

take notice, showed that he had but a one-half interest, and that one-half interest was obtained from Russell. Roberts, of course, knew it personally.

We might further note that it is our serious contention, which we believe can't be denied, that when an interest in realty is conveyed or encumbered and the extent of it is not denominated in the instrument conveying or encumbering it, the party taking is necessarily put upon inquiry and *must know* what the record shows.

The record having shown that he had but a one-half interest, they must know that he had but that interest.

Second. They introduced certificate of sale on foreclosure given by sheriff to Roberts of the original mortgage. (See folios 191–193, inclusive, pages 97, 98, printed Record.)

Third. They next introduced deed from Sheriff Mulvenon to John M. Roberts, reciting the mortgage; reciting the decree purporting to foreclose all the right, title, and interest of Collins in the mining claims; reciting the receipt of the purchase-money covering the amount of the mortgage, and concluded with the grant of said Roberts to his heirs and assigns forever "all that particular mining lands, mining grounds and mining claims known as the Poland and Hamilton."

NOTE.—This would seem to be an effort to convey all the property by the authority of a mortgage and a decree foreclosing, conveying but one-half of it, and the decree directing *that interest only* to be sold.

We apprehend, however, that this can't be construed and will not be attempted to be construed as a conveyance of but the one-half first encumbered by the mortgage itself and decreed to be sold by the court.

It seems from the record that Roberts died. On the 20th day of July, 1891, his administrator sold to one E. M. Dickey, by order of the probate court of Yavapai county, the Roberts interest in these mines, the granting part of it being as follows: "All of that particular mine or mining claim named and designated as the Poland; also the Hamilton mine or mining claim," referring to book and page. (See deed of Lowry, administrator, to Dickey, pages 101–103, printed Record.)

Now, this particular sale and this authority and this interest were all derived from the Russell deed to Collins, executed October 25, 1882, which was mortgaged to Roberts a year later, and all of which the record emphatically shows and nobody denied.

Necessarily the purchaser had to know the record status of his title, and in law he did know it.

Dickey could take nothing but the one-half interest owned by Collins and owned by Roberts. Nothing more could be conveyed. The one-half interest in this property that was obtained by Collins after this mortgage certainly was not encumbered, certainly was not intended to be, and was not intended to be sold by the decree.

After Dickey obtained this property under administrator's sale in 1891, on May 1, 1893, and on June 20, 1893, respectively, on his individual application beginning some time in 1893, he obtained and filed for record patents of the United States in his own name to the Poland and Hamilton mining claims. (This we gather from the printed Record, at page 43, which patents were considered by the courts below.)

This seems to be the beginning of his record acts of hostility and adverse holding, if, indeed, he may be permitted

to ignore his statutory remedy provided by "advertising out," and substitute one of his own.

They next introduce (as shown on pages 42, 43, printed Record) deeds of Dickey to C. D. Armes, and also of C. D. Armes to E. B. Gage, May 4, 1895 (see folio 78, printed Record); deed of E. B. Gage to D. M. Ferry *et al.*, May 13, 1895 (folio 76, printed Record); E. M. Dickey to F. M. Murphy, March 10, 1892 (folio 79, printed Record), and deed of F. M. Murphy to D. M. Ferry *et al.*, July 2, 1894 (folio 78, printed Record).

This completed the chain of title upon which defendants base their claim to all the property and upon which they base the strength of their plea of limitation, by all of which is shown that they began with a mortgage encumbering one-half of the property, and they knew it and had to know it, and wind up by claiming it all without paying for the half belonging to plaintiff Thompson.

It will be noticed from this record and from the answer (that is, the amended answer) of defendants below that they claim by limitation, saying that they have been in hostile possession for more than five years, and on that they base their plea of limitation.

It would seem, however, from one feature of the record (found at folio 80, page 40, printed Record) that the facts show that Dickey, on his application from his own filing from a location he made himself on December 14, 1891—(the language is this, "by Mr. Johnston, notice of location of Poland mining claim by E. M. Dickey," which states that it is a relocation of the Poland mining claim, dated December 14, 1891; recorded December 15, 1891, Book 33 of Mines,

pages 17, 18)—ignored the title by which they now claim he was holding.

This would certainly be ignoring the adverse holding—that is, the title that he *claims* to have by adverse holding.

This completed the record evidence bearing directly upon the issues made by the pleadings and gave the legal record status of the two respective sides at the time the action was brought.

True, there was some oral evidence offered attempting to show abandonment and other matters, which were not sustained and which the court paid no attention to, as we gather from its decree.

The court filed a written opinion rendering its findings and decision to the following effect: "I find therefore that the defendants' plea of the statute of limitations is well taken." "There is another question of great interest which I have considered somewhat, and that is whether or not the judgment and decree in Roberts *vs.* Collins operate as an estoppel of record against the defendants." "As, in my judgment the statute of limitations disposes of the case, I do not deem it necessary or essential to state my conclusions on this question," and concludes by saying "Judgment will be entered for the defendants." (See opinion of district court, folios 206–223, pages 104–112, printed Record.)

This was appealed to the supreme court of the Territory (as shown by printed Record from folio 223 to 233), and on hearing on appeal the supreme court sustained the findings and judgment of the court below on the plea of limitation, the court saying that the district court found for the defendants, "that the defendants for five years before suit filed October 6, 1896, had been in open, notorious, exclusive, and

peaceable and adverse possession of both the Poland and Hamilton mining claims, and plaintiffs were barred by the statute of limitations, from which judgment plaintiffs appealed." On the question of limitation alone the district court decided the case, and decided no other question. The supreme court affirmed this judgment, and further held a question that was not passed on by the court below at all, that under the equitable doctrine of laches Thompson was estopped from asserting that he was a cotenant and that appellees are trustees of the title for his use. (See opinion supreme court, page 117, folios 234–245, printed Record.)

A motion for rehearing was presented to the supreme court upon alleged error. (See folios 246–254, inclusive, printed Record.) It was denied, and from that judgment and decree sustaining judgment and decree of the court below and adding to it a decree of estoppel, of record, against Thompson, which was not passed on by the court below at all and not before the court on appeal, because not included in the judgment below, the plaintiff Thompson, the appellant here, has appealed the case to this court for review and determination; and, for a reversal of the judgment of the supreme court, we make the following assignment of errors alleged to have been committed by the supreme court:

We say first that the court erred in finding that the plea of the statute of limitations was a good defense and that the statute had run at the time the suit was begun, because—

First. The statute of limitations of the Territory of Arizona, which applies in this case, is not applicable where the property involved is a mining claim, for the reason that the Revised Statutes of the United States, section 2324, provides a remedy and a method by which co-owners in mining

claims can acquire the title of their co-owner who fails to contribute his portion of the expenditures required for annual assessment-work, &c. This is a remedy provided by the Federal statute, and by it persons seeking to be relieved from burdens by co-owners must be governed. They cannot disregard and ignore the statutory remedy and make a remedy of their own in lieu of it.

Second. The sheriff's deed to Roberts, mortgagee, was a sale of but one-half interest, and Roberts knew it, and the world had to know it, because it was a matter of record, and the extent of the interest not being defined by the mortgage or by the decree, therefore purchasers were put on inquiry and driven to the record to see what the interest was and the extent of it.

Third. Because Collins having obtained a one-half interest in the Poland and Hamilton mining claims, which he didn't own at the time he gave the mortgage, and which was therefore not incumbered by the mortgage, but which he did own at the time of the foreclosure and the purchase of the half interest incumbered or mortgaged to Roberts, therefore made Roberts, Collins, and Scofield, to whom Collins had conveyed a one-fourth interest, joint owners or tenants, or tenants in common in the property; and therefore, being joint owners or co-owners or cotenants in common in the mining claims, they were bound to follow the remedy provided by the Federal statute in disposing of the interest of the other co-owner in the property—that is, by what is termed "advertise him out"—which could be done in ninety days either by public notice or personal service.

Roberts and Collins and Scofield being cotenants and joint owners of the mining claims, necessarily Dickey, as the successor in the interest of Roberts, was, and also had to be, and was, bound by the same rule.

In the next place, the court erred in holding that, under the equitable doctrine of laches, Thompson was barred or estopped by the record:

First. Because the question had not been decided by the court below, and therefore was not pertinent for decision there.

Second. The court assumed to pass its judgment upon the fact that the plaintiff Thompson had moved his mill from the mining claim and hadn't aided defendants and their predecessors in title in doing the assessment-work, and therefore because of that the court ignored the remedy of advertising out provided for by the Federal statute, by which one cotenant might absorb the interest of another, and endorsed the course taken by the defendants who ignored the statutory remedies provided for them. We say that there is no law provided which requires the loss of any interest of a cotenant or joint owner in mines by any other method than by advertising out, as provided by section 2324 of the Revised Statutes of the United States.

Therefore our reason is, in this assignment that, where a statute fixes a mode of absorbing an interest, or provides a remedy, if you please, for a joint owner, he must follow it and can't substitute it with some other course—one of his own.

Third. The court erred in finding that the deed from Lowry, administrator of Roberts, to Dickey was notice to

Scofield and Thompson that Dickey's entry was hostile to them and was notice to them that his holding was coextensive with his deed, because the Lowry deed could convey no more interest than Roberts first obtained at the foreclosure sale, which was an undivided one-half interest, which the record showed, and it could be no more; and, furthermore, the law requires actual notice to be proven by defendants. They didn't do it.

Fourth. The court erred in finding that the relocation of the Poland claim was an act evidencing an adverse holding, and even if it did it was not five years before the bringing of this suit, and, in the next place, the claim was not subject to location at that time.

Fifth. The court erred in finding the application for patents by Dickey to the mines equivalent to a disseizin and ouster, because Thompson and Scofield were co-owners with Dickey, who was the applicant for the patent, and, not having pursued his statutory course before named, in equity he was acting as trustee for them to the extent of their undivided one-half interest in the mines, for he had never advertised them out under section 2324, Revised Statutes of the United States; and, furthermore, even if it was a disseizin and ouster, this act did not bar this action, because it was not five years before the bringing of this suit.

Therefore we say that the facts in the case do not sustain the findings and judgment of the court, and for a correction of these errors we appeal to this court. (See assignment of errors filed in Supreme Court for consideration here, folios 227–232, printed Record.)

This statement of the facts of the case and the case as it is, we believe, bring out all of the legal propositions necessary to be decided and which are involved in this case.

We assume, therefore, in the first place, that the plaintiff Thompson and his predecessors in title or grantors from Collins down to himself were cotenants or joint owners in the mines known as the Poland and Hamilton, the owners of one undivided one-half interest, and Roberts and his successors in interest the other.

They being joint tenants, cotenants, or owners in common, if ousted, should have been, and necessarily had to be, ousted by the remedy provided by statutes for such identical cases and precise purposes, and therefore the statute of limitations did not run or begin to run until that course had been taken and their interest by that means disposed of, which was never done.

In the second place, if there was ever disseizin and ouster, if it ever took place at all (which, if taken, forces us to ignore the statute providing a remedy for such cases), it began with Dickey's action to obtain title from the Government in the issuance of patents to him and his filing the same for record claiming to hold and own all, at which time and only at which time he then deraigned title from the Government itself.

Ordinarily, of course, this would be hostile, but being mines and subject to statutory rules for ouster, it was not therefore hostile. But even if it was, it was less than five years before the commencement of this action, and therefore didn't bar the action, and we assume, and rely upon it implicitly, that this is the first real act of apparent legal hostility to a co-owner's title that anywhere appears of record.

We assume, in the next place, that the plaintiff and his grantors, having been co-owners in mining claims and mining lands, could not be estopped of record from setting up this claim at the time this suit was brought, because defendants and their grantors failed to give them notice of any adverse claim to their interests which they claimed to hold against them, as provided by section 2324 of the Federal Statute for advertising out, it being the only statutory remedy providing for notice of hostility and which they were bound to follow, and therefore plaintiff and his grantors had a right to rest composedly upon their joint ownership and upon a knowledge of the fact that when a co-owner or cotenant holds the whole property for himself he holds for all of his co-owners.

In the next place, we assume that when Dickey took the United States patent to all the property in his own name the law will hold him responsible as a trustee for his co-owners, and that he took the title in trust for them, and that therefore they are entitled to have their rights so declared.

We assume that the statement of facts of record bring out these legal propositions, and that they are abundantly sustained by the authority which we shall now proceed to show.

At date of sale to Roberts he became joint owner with Collins and Scofield. So, also, became his grantees and subsequent holders. His holding afterwards, and likewise the holding of his grantees, were the holding for all. The holding by one was in trust for all, *unless* there was disseisin and ouster, and disseisin and ouster of one cotenant by another can only be as provided by law.

In the case at bar, therefore, there was no ouster. Hence, no limitation, because—

1. See section 2324, Revised Statutes United States.

This section, among other things, provides that:

"Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing, or by publication published in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days, &c., &c., the delinquent should fail to contribute his proportion, &c., his interest in the claim shall become the property of his co-owners, who have made the improvements."

This is the *only* course provided by statute for ouster in such cases.

They do not pretend that this was ever done or ever attempted. Query, Can it be ignored and a different remedy substituted by the party ignoring it? We assume it cannot.

2. They were cotenants, co-owners, in the joint estate, and therefore trustees for each other, and hence, from this record, there was no ouster of a joint owner under general law, for the rule is:

1. The statute of limitations, as between trustee and *cestui que trust*, has no application and no length of time is a bar.

2. If, however, a trustee, whether of an express or of a constructive trust arising by operation of the law, repudiates

his trust, the statute *will not* begin to run in his favor until his *denial of the trust is distinctly brought to the notice* of the *cestui que trust*—it must be brought home to him—and when the trustee relies on the statute of limitations the *burden is on him to show* when notice of his repudiation was brought home to the *cestui que trust.*

This is the text law in this country.

See Perry on Trusts, sections 863, 864.

This doctrine is also expressly declared in the following cases:

Hunt *vs.* Patchin, 35 Federal Rep., 816.
Zeller *vs.* Eckert, 4 Howard, 295.
McClasky *vs.* Barr, 47 Federal Rep., 154.
Union C. Silver M. Co. *vs.* Taylor, 100 U. S., 541.
Turner *vs.* Sawyer, 150 U. S., 578.

In Zeller *vs.* Eckert the action was by one joint tenant against another after twenty-five years' holding, after limitation would bar the action when no privity existed. Limitation was pleaded and on this point this court, speaking through Justice Nelson, drawing the distinction between cases where privity of estate did not exist and cases where it did, said:

"The only distinction between this class of cases and those in which no privity between the parties existed when the possession commenced is in the degree of proof required to establish the adverse character of the possession." "As that was originally taken and held in subserviency to the title of the real owner, a clear, positive, and continual disclaimer and disavowal of the title, and assertion of an adverse right,

and notice to be brought home to the party, are indispensable before any *foundation can be laid* for the operation of the statute."

In Hunt *vs.* Patchin, 35 Federal Rep., 816, it is expressly held there, in such cases, in the proof of the notice of disclaimer and adverse holding, which would bring the notice home to the co-owner against whom he held, that the burden was on him who pleaded the statute.

In the case at bar there is a total absence of this degree of proof required by these cases. There is no proof of *actual* notice whatever; no pretension that there was any.

In McClasky *vs.* Barr, 47 Federal Rep., 154, the action was for partition of a joint estate, in which many disputes between the joint owners arose; among them the plea of limitation by some of the long-time holders was set up, and on that point the court said:

"Much stress is laid on the character of the defendant's occupancy, and there is a showing of the costs of expensive and permanent structures and improvements, amounting between 1875 and 1890 to nearly $1,000,000.00, as indicating ouster and adverse possession and notice, and numerous authorities are cited in support of that contention."

"But," said the court, "we must not lose sight of the fact that the original possession of the defendants and of their grantors was in privity with the title of the rightful owners, and that it is admitted that neither complainants or cross-complainants ever had *actual* notice of an adverse holding (in this case at bar certainly no proof of it), and in that view the character of defendant's occupancy, permanence or cost of improvements and their long list of decided cases fade

into nothingness before the decision of the Supreme Court of the United States in Zeller *vs.* Eckert."

The case at bar falls clearly before the principles of this case also. While in McClasky *vs.* Barr it was admitted that *actual* notice had not been "brought home" to complainants, and while such admission is not patent in the record in the case at bar, it is equally clear that the defendants here as clearly failed in their plea of limitation as they did in the Barr case, because they, in this case, *wholly failed* to prove *actual* notice, &c. The record is as silent as the grave on it, and they had to prove it—prove *actual* notice of disclaimer of plaintiffs' rights and adverse holding thereto for the statutory period before their plea could avail, because the "*onus was on them.*"

In Mining Co. *vs.* Taylor, 100 U. S., 37, the action was ejectment by a co-owner against another for an undivided interest in a mining claim in Nevada. Limitation was pleaded and strongly urged, but it failed because of the application of the principles above stated.

Turner *vs.* Sawyer, 150 U. S., 578, was an action to quiet title—to have defendant Turner declared a trustee for use of plaintiff for an undivided interest in a mine, "the Wallace lode."

It was similar to the case at bar, having similar facts upon which the case was determined.

Turner claimed title to all the property by virtue of sheriff's deed, purporting to convey all, as defendants in the case at bar pretend to claim.

He, claiming under the sheriff's deed, secured United States patent all in his own name, just as defendants here through Dickey did.

But the court applied the principles of cotenancy and trusteeship there as in the cases before cited, and said:

"Whether he procured the receiver's receipt by fraudulent or false representations or not, as charged in the bill, it is clear, to put on it the most favorable construction for him, that he acted under a misapprehension of his legal rights."

And he was declared a trustee and required to convey as prayed for in the bill.

Many other cases, of course, to the same effect might be cited, but surely these are enough.

From these there certainly was no disseizin and ouster, and therefore there could be no limitation.

Query. But after all does the statute of limitations of Arizona apply to this case?

Paragraph 2299 prescribing five years as the period of limitation, stating the terms for its application, and on this they rely.

But this section is followed by paragraph 2300, placing modifications on it in the following language:

"The peaceable and adverse possession contemplated in the preceding section, as against the person having right of action, shall be construed to embrace not more than one hundred and sixty acres, including the improvements or the number of acres actually enclosed, should the same be less than 160 acres," &c., &c.

The court knows judicially that two mining claims do not contain 160 acres, and there is no proof of enclosure.

If literally construed, can it apply? It really seems not.

One other thing on adverse possession. Notwithstanding it is the settled law that when one joint owner claims against another by adverse possession, actual notice, &c., must be

proven, in the court's finding of adverse possession it failed to find that such adverse possession had been or was "actual and visible."

Arizona Statutes, paragraph 2304. Revised Statutes, 1887, require it should be.

The finding, therefore, is not as the statute requires. Not only so, but such strength is required by this court.

See Ward *vs.* Cochran, 150 U. S., 597.

Furthermore, a tenant in common has a right to presume that the possession of his cotenant is his possession until notice to the contrary—notice actual, brought home—is served on him—reaches him.

This principle is not only elementary, but is maintained by the decisions of this court, and especially in Zeller *vs.* Eckert.

See also—

Miller *vs.* Miles, 46 California, 535.

Agrin *vs.* Alexander, 58 California, 21.

ESTOPPEL.

The trial court referred to the plea—estoppel by record—but did not decide it. The supreme court did, however, when it was not subject to review and reversal. However this may be, it was certainly error, because under no rule of law brought out by the facts in this record could plaintiff be estopped.

The failure to appear and answer at the foreclosure on the part of plaintiff and Collins could not do it, for there they had no answer to make. That was an action for foreclosure "of the mortgaged premises," in which they knew that they had no interest, and therefore no answer to make. The no-

tice to them was as to "the foreclosure of 'the mortgaged premises,' &c.," which they knew to be the half interest in which they had no interest. Hence no answer. The decree was for the foreclosure of this selfsame interest. Hence it did not, could not, affect our interest, that not being part of "the mortgaged premises"—not incumbered and not intended to be, not decreed against and not intended to be. Then how can any reliance be placed in estoppel for this cause?

"But we are told you failed to file your adverse when we applied for the patent, &c."

Our reply is: We did not have to. You and we were joint owners of the joint estate. We deraign title from the same common source, and that, therefore, the law did not require of us the filing and trial of an adverse.

This is emphatically decided in case of—

Hunt *vs.* Patchin, 35 Federal Rep., 816; also,

Turner *vs.* Sawyer, 150 U. S., 578—

where it is said:

"The propriety of such a claim was not a question which seems to have been contemplated in requiring the advertising of hostile claims."

And it is there declared to be the settled doctrine of this court that "advertising out" is not required where the title is deraigned from a common source and, or, held in joint estate.

If we are right, and we feel we cannot be wrong, the legal conclusion is irresistible that when Dickey secured the United States patents in his own name he did not thereby destroy the title of plaintiff Thompson and his grantors; but by

such act he became, and his grantors succeeding to his interests also became, trustees for an undivided half interest for plaintiff's benefit.

We say this because the settled rule is:

"A United States patent is received subject to all equitable obligations with which the patentee may stand charged in virtue of any trust or confidence resting upon him."

This is positively settled in—

Hunt *vs.* Patchin, 35 Federal Rep., 816 to 819.

And it is strongly supported by the following high authorities:

Kimball *vs.* McIntyre, 1 Pacific, 167.
Meador *vs.* Norton, 11 Wall., 457.
Stark *vs.* Starrs, 6 Wall., 419.
Reis *vs.* Spence, 21 Cal., 511.
Wilson *vs.* Castro, 31 Cal., 438.
Bloodworth *vs.* Lake, 33 Cal., 263.
O'Connor *vs.* Irvine, 74 Cal., 435.
Hollett *vs.* Collins, 10 How., 186.
Threadgill *vs.* Pintood, 12 How., 38.
Marquez *vs.* Frisbee, 101 U. S., 473; 25 Co-op., 800.
Johnson *vs.* Touley, 13 Wall., 72.
Bassick M. Co., *vs.* Davis, 17 Pac., 294.
Turner *vs.* Sawyer, 150 U. S., 578; 37 Co-op., 1189.

Upon these facts and authorities we confidently submit that the courts below committed error in failing to decree to us our rights as demanded in our bill, and therefore submit that a reversal should be had here.

J. F. Wilson,
Attorney for Appellant.